Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In The
Supreme Court of the United States
October Term 1996

ARTURO WEAVER,

Petitioner,

v.

DEPARTMENT OF JUSTICE

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

Arturo Weaver
P.O. Box 84
Los Indios, Texas 78567
(210) 399-1044

Pro se

HD PP

QUESTIONS PRESENTED

Whether the Court of Appeals erred in affirming the Board's decision allowing the Agency to discriminatorily and inequitably deny the petitioner a retirement benefit that it extends to an equally qualified class of employees?

Whether the Court of Appeals' erred in affirming the Board's decision allowing the Agency to deprive petitioner of the equal protection under the law, guaranteed by the due process provisions of the 5th and 14th amendment?

Whether the Court of Appeals fail to consider the constitutionally correct and relevant decision recorded by the Civil Service Commission in minute one on May 20, 1958?

Whether the Court of Appeals err when it assumed that mere non-enumeration of petitioner's position in the second portion of 5 U.S.C. § 8331(20) sufficed for government to deny petitioner benefit?

Whether the Court of Appeals' affirmence affect the benefit in question for the petitioner as well as for an equally qualified class of federal employees?

Whether or not the discriminatory and inequitable behavior of the federal government's so justifiable as to allow the violation petitioner's constitutional rights?

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Arturo Weaver respectfully requests this Court to issue a writ of certiorari to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at unknown and is reprinted in the Appendix at App. 1-6.

JURISDICTION

The date on which the United States Court of Appeals decided my case was July 12, 1996. A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 7, 1996, and a copy of the order denying rehearing appears at App. 7-8.

The decision of the Merit System Protection Board is reprinted in the Appendix at App. 9-15.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 5th Amendment

No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; no shall private property be taken for public use, without just compensation.

The 14th Amendment (pertinent part)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; no deny to any person within its jurisdiction the equal protection of the laws.

5 U.S.C. § 8336 (c) (1), Immediate retirement

An employee who is separated from the service after becoming 50 years of age and completing 20 years of service as a law enforcement officer...is entitled to an annuity.

5 U.S.C. § 8331 (20), Definition

"law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this paragraph, "detention" includes the duties of—

(A) employees of the Bureau of Prisons and Federal Prison Industries, Incorporated;

(B) employees of the Public Health Service assigned to the field service of the Bureau of Prisons or of the Federal Prison Industries, Incorporated;

(C) employees in the field service at Army or Navy disciplinary barracks or at confinement and rehabilitation facilities operated by any of the armed forces; and

(D) employees of the Department of Corrections of the District of Columbia, its industries and utilities;

whose duties in connection with individuals in detention suspected or convicted of offenses against the criminal laws of the United States or of the District of Columbia . . . require frequent (as determined by the appropriate administrative authority with the concurrence of the Office) direct contact with these individuals in their detention, direction, supervision, inspection, training, employment, care, transportation, or rehabilitation.

MINUTE 1 OF MAY 20, 1958 (Minutes of the Civil Service Commission, [OPM])

By Minute 1 of May 20, 1958, the Commission recorded its decision that the word "detention" appearing in the law is not limited to employees of agencies specifically listed therein but is construed to include employees of any agency whose duties are as described in the sentence.

OBREMSKI v. OPM & MSPB, 699 F.2d, note 24, (D.C. CIR 1983)

. . . We thus strictly separate the questions whether petitioner engages in "detention" (which requires a construction of the term "frequent"), and whether petitioner's "duties are primarily . . . detention."

STATEMENT OF THE CASE

This case involves retirement benefits under Title 5 U.S.C § 8336 (c) (1). It also involves the statutory definition of law *enforcement officer* in 5 U.S.C. § 8331 (20). In November of 1993 I applied for retirement after serving more than 20 years in the Immigration & Naturalization Service. I am 63 years old. I requested that my retirement application be processed under 5 U.S.C § 8336 (c) (1). The basis of my claim is the fact that during my entire tenure, the duties of my position required frequent direct contact with detained individuals who were suspected or convicted of violating the criminal laws of the United States. Specifically, as a diesel mechanic, I was required to use inmate labor to carry out the duties of my position.

On April 12, 1995, the Agency's denied my request. The Agency found that I did not show that the duties of my position put me in frequent and direct contact with individuals in detention suspected or convicted of offenses against the criminal laws of the United States.

On May 1, 1995, I appealed the Agency's decision to the Merit Systems Protection Board. On August 31, 1995, the Board found that my duties included frequent direct contact with individuals in detention. However, the Board affirmed the Agency's decision because I did not establish that the primary duties of my position were to detain individuals suspected or convicted of offenses against the criminal laws of the United States. The Board affirmed the Agency's decision notwithstanding

that I based my claim on the 1958 decision by the Civil Service Commission (OPM). *SEE* Minute 1, CSC, May 20, 1958, page 3.

On October 4, 1995, I petitioned the MSPB for review of its initial decision. I argued that the Judge erred by citing elements that are appropriate in determining whether duties are *primarily...detention,* but not appropriate in determining whether I engaged in *detention*. I argued that *detention* requires a construction of the term *frequent*. *SEE* Obremski v. OPM & MSPB, 699 F.2d 1270, note 24, (D.C. Cir. 1983), page 4. On December 5, 1995, the MSPB denied my petition for review.

On March 22, 1996, I petitioned the Court of Appeals for the Federal Circuit for judicial review. I essentially argued the same issues and facts that I asked the MSPB to review. On July 12, 1996, the Court of Appeals affirmed the Board's decision and on August 7, 1996, it denied my petition for rehearing.

The Court of Appeals' affirmence of the Board's decision allowed the Agency great deference in its construction of the statute. Such great deference to the Agency's present day construction of the statute violates my right to the equal protection of the law guaranteed by the due process provisions of the 5th and 14th constitutional amendments.

While the Fifth Amendment contains no equal protection clause, it does forbid discrimination by the federal government that is so unjustifiable as to be violative of due process. This Court has held that the federal government, like the states, must govern impartially. The Court of Appeals made it clear that I was not eligible for coverage under the second part of the statute because I did not work in a position enumerated therein. I could not be reasonably expected to litigate a finding that was not made clear by the Agency or the Board. The Court of Appeals ignored the fact that in 1958 the Agency asked the Civil Service Commission for an opinion on the statute's applicability to a class of employees to which I belong. Documentary evidence shows that in 1958 the Agency accepted the commission's

construction of the statute, making it applicable to my class of employees. *SEE* Appendix 17-18. Rules and instructions are currently in place in the Federal Personnel Manual on how to process retirement applications like that of petitioner's class. *SEE* Federal Personnel Manual Supplement 831-1 (subchapter) S9-3. c.) at Appendix 19-21.

The Court of Appeals erred in assuming that non-enumeration alone, in the second part of the statute, suffices to extinguish the benefit derived from frequent direct contact. I prevailed in establishing frequent direct contact and that places me in the same league as the classes that are e enumerated therein. Enumeration can be established with the stroke of a pen, whereas, establishing frequent direct contact takes 20 years of work . The Civil Service Commission was wise to avoid violating the 5th and 14th amendment in their 1958 decision.

The Court of Appeals ignored overwhelming documentary evidence in the record that shows that its decision affects a class of federal employees and not just the petitioner exclusively?

The Court of Appeals' affirmence of the Board's decision allows the Agency to deny petitioner a significant benefit without providing substantial evidence that justifies the violation of due process.

REASONS FOR GRANTING THE WRIT

The main reason this Court should grant certiorari is because the Court of Appeals gives rise to a constitutional question. The Court of Appeals' decision violates the due process clause of the Fifth and Fourteenth Amendment.

This Court has indicated that it often tests the validity of federal legislation under the due process clause of the Fifth Amendment by the same rules of equality it tests the validity of state legislation under the Fourteenth Amendment. The Fifth Amendment contains no equal protection clause, but it does

forbid discrimination by the federal government. The federal government must govern impartially.

In the instant case, the Court of Appeals' erred because it allows the federal government to favor certain class of employees while it discriminates against another equally qualified class of employees. I am part of the discriminated class of employees. All things being equal, the only distinction between my class and the classes favored is mere enumeration. The class of employees that I belong is not enumerated in A-D in the second part of 5 U.S.C. 8331(20). Even though some the discriminated class of employee positions are in the agency's list, they are not in any of the listed class if positions enumerated in A-D in the second part of the statute. The Court of Appeals is wrong because it ignored a 1958 decision by the Civil Service Commission. The decision by the CSC resolved the question of enumeration, favoring my class of employees. The Civil Service Commission resolved the important enumeration question without raising a constitutional issue.

This Court should decide this case because the Agency has shifted away from the construction of the statute that it accepted from the Civil Service Commission in 1958. The decision of the Court of Appeals has placed all similarly situated class employee at risk including those that are on the Agency list of eligible positions. They may be on the Agency's list of eligible positions, but, like my class of employees, they are not enumerated in the statute either. *SEE* Appendix 22-27, emphasis Appendix 26. This case is important because I have established entitlement to a retirement benefit, yet the Court of Appeals allows the federal government to violate the constitution without justification. This case is important because the federal government, at the Agency's local personnel office level, has orally denied this retirement benefit to other similarity situated former co-workers who have since retired. Likewise, the local personnel office has orally denied this retirement benefit to other similarly situated former co-workers, who are currently active. More recently, a

local personnel office employee told a currently active qualified employee, "We denied the coverage to Weaver and you are not eligible either." The local personnel office is not the appropriate administrative authority referred to in the second part of the statute.

The decision by the Court of Appeals does not impact the whole nation directly. However, the entire nation is nonetheless affected because the Court of Appeals triggered a violation of constitutional law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Arturo Weaver, Pro Se

Date: Oct. 10, 1996

App. 1

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

96-3115

ARTURO WEAVER
Petitioner,

v.

DEPARTMENT OF JUSTICE
Respondent.

JUDGMENT

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD
in CASE NO(S). DA0831950578-I-1

This CAUSE having been heard and considered , it is

ORDERED AND ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED: July 12, 1996 *FRANCIS X. GINDHART, CLERK*

ISSUED AS A MANDATE: SEPTEMBER 3, 1996

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

96-3115

ARTURO WEAVER,

Petitioner,

v.

DEPARTMENT OF JUSTICE

Respondent,.

DECIDED: July 12, 1996

Before ARCHER, *Chief Judge*, MICHEL, and RADER, *Circuit Judges.*

ARCHER, *Chief Judge.*

DECISION

Arturo Weaver appeals the decision of the Merit Systems Protection Board (MSPB) upholding the decision of the Department of Justice, Immigration and Naturalization Service (INS), finding Mr. Weaver ineligible for retirement credit under 5 U.S.C. § 8336(c)(1), as a law enforcement officer (LEO) for his service with the INS. We *Affirm.*

DISCUSSION

Mr. Weaver worked at the INS Processing Center in Port Isabel, Texas as a Heavy Mobile Equipment Mechanic from 1973 to 1995. By letter dated January 31, 1994, Mr. Weaver requested retirement benefits under § 8336(c)(1) for law enforcement officers. The INS denied Mr. Weaver's request by decision dated April 12, 1995.

Section 8336(c)(1) allows for early retirement of law enforcement officers and provides that an "employee who is separated from the service after becoming 50 years of age and completing 20 years of service as a law enforcement officer . . . is entitled to an annuity." A " law enforcement officer" is defined as "an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States." 5 U.S.C. § 8331(20) (emphasis added). Section 8331(20) further provides:

> For the purpose of this paragraph, "detention" duties of--
>
> (A) employees of the Bureau of Prisons and Federal Prison Industries, Incorporated;
>
> (B) employees if the Public Health Service assigned to the field service of the Bureau of Prisons or of the Federal Prison Industries, Incorporated;
>
> (C) employees in the field service at Army or Navy disciplinary barracks or at confinement and rehabilitation facilities operated by any of the armed forces; and
>
> (D) employees of the Department of Corrections of the District of Columbia, its industries and utilities;

whose duties in connection with individuals in detention suspected or convicted of offenses against the criminal laws of

the United States or of the District of Columbia . . . require frequent (as determined by the appropriate administrative authority with the concurrence of the Office) direct contact with these individuals in their detention, direction, supervision, inspection, training, employment, are, transportation, or rehabilitation.

On appeal, the board considered whether Mr. Weaver's duties were primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States. The board found that as a Heavy Mobile Equipment Mechanic, Mr. Weaver's duties consisted of the maintenance, repair, modification, and overhaul of government vehicles, and that he often recruited and supervised detainees to assist in his work and could not have performed a variety of his expected tasks without the detainee labor. Thus, the board found that Mr. Weaver came in frequent direct contact with individuals who were suspected or convicted of criminal offenses under United states law. Nonetheless, the board concluded that Mr. Weaver did not establish that the primary duties of his position were to detain individuals suspected or convicted of offenses against the criminal laws of the United States. The board stated that Mr. Weaver did not show how his interactions with detainees constituted the basic reason for the existence of his position or show that the bulk of his time was spent detaining, directing, supervising, inspecting, training, employing, caring for, transporting, or rehabilitating detainees. Thus, the board concluded that Mr. Weaver's use of detainees details was incidental to the duties of his position.

Our review of the decision of the MSPB is limited to determining whether it is: (1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures require by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence. 5 U.S.C. § 7703(c) (1994).

Before this court, Mr. Weaver does not contest the finding that his duties were not primarily that of a law enforcement officer. Indeed, that finding is supported by substantial evidence. Mr. Weaver's duties primarily consisted of maintenance and repair of government vehicles.

Mr. Weaver argues, however, that because the board found that he had frequent direct contact with detainees, he satisfies the second part of § 8331(20). Mr. Weaver, however, did not work in one of the positions enumerated in the second part of § 8331(20) and has, thus not shown that portion of the statute to be applicable. *See Obremski v. Office of Personnel Management,* 699 F.2d 1263, 1270 (D.C. Cir. 1983). The board therefore did not consider the second part of the statute and properly dealt only with the question of whether under the first part of the statute Mr. Weaver's duties were primarily law enforcement. Mr. Weaver also argues that his appeal was procedurally deficient because he was not allowed to appeal to the Office of Personnel Management (OPM). Between the time Mr. filed his appeal with the INS and the INS issued its decision, OPM issued new regulations delegating authority to make a final determination regarding LEO credit to the employing agency.

Mr. Weaver claims the INS delayed seventeen months [sic] in issuing its decision and because of that delay he was deprived of his right to appeal to OPM. We are not persuaded by this argument. Mr. Weaver has not shown that he INS was required to issue its decision within any time frame or that it delayed issuing its decision for the purpose of preventing Mr. Weaver from appealing to the OPM. Further, Mr. Weaver has failed to show that he was entitled to an appeal to OPM. OPM delegated the authority to make final LEO credit determinations to the employing agency and Mr. Weaver has not shown that OPM lacked the authority to make or otherwise improperly made this delegation. In all events, Mr. weaver obtained review of the agency action by the board and, thus has not demonstrated any

prejudice as a result of the alleged INS delay in issuing a decision.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

96-3115

ARTURO WEAVER,

Petitioner,

v.

DEPARTMENT OF JUSTICE,

Respondent.

ORDER

UNITED STATES COURT OF APPEALS for the FEDERAL CIRCUIT

ORDER

Before ARCHER, Chief Judge, MICHEL, Circuit Judge, and RADER, Circuit Judge.

A petition for rehearing having been filed by the PETITIONER, UPON CONSIDERATION THEREOF, it is

ORDERED

that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on September 3, 1996 unless another time becomes appropriate under Rule 41.

FOR THE COURT
FRANCIS X. GINDHART, CLERK

Dated: August 7, 1996

by_____
Brian P. LeDuc
Associate Chief Deputy Clerk

cc: ARTURO WEAVER
HILLARY A. STERN

FILED
U.S. COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

AUG. 7, 1996

FRANCIS X. GINDHART, CLERK

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

ARTURO WEAVER Appellant,	)	DOCKET NUMBER DA-0831-95-0578-I-1
v.	)	
DEPARTMENT OF JUSTICE Agency	)	Date: AUG. 31, 1995

Hector H. Guerra, Brownsville, Texas, for the appellant.

William C. Peterson, Esquire, Harlingen, Texas, for the agency.

BEFORE

Michael T. Dougherty
Administrative Judge

INITIAL DECISION

On May 1, 1995, Arturo Weaver appealed the agency's April 12, 1995 determination that he was not entitled to law enforcement officer (LEO) credit for his service with the Immigration & Naturalization Service(INS). The Board has jurisdiction over the appeal. 5 C.F.R. § 831.910(a) (1995). A hearing was held at the appellant's request. Based on the following analysis and findings the agency's determination is affirmed.

ANALYSIS AND FINDINGS

The appellant was employed as a WG-11 Heavy Mobile Equipment Mechanic at the INS Service Processing Center (the Facility) in Port Isabel, Texas, from June 24, 1973 to January 27, 1995. *See* Appeal File (AF), Tabs 5, 8, 32, Exhibit T. In a January 31, 1994 letter, the appellant asserted that he was entitled to the retirement benefits to which law enforcement officers are entitled under 5 U.S.C. § 8336(c). AF, Tab 5, Subtab 2b at 26. On April 12, 1995, agency head Stephen R. Colgate issued a final agency decision on the appellant's request for LEO status. *See* 5 C.F.R. § 831.902 (1995); Tab at 1. Colgate determined that the appellant was not entitled to LEO credit based on the duties of his position. The appellant then filed this timely appeal on May 1, 1995. *See* 5 C.F.R. § 1201.22(b) (1995); AF, Tab 1, Tab 5, Subtab 2(a).

The appellant bears the burden of proving he is entitled to LEO retirement credit.

Under 5 U.S.C. § 8336(c)(1), an employee is entitled to preferential retirement credit for service as a "law enforcement officer," which is defined as an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States. 5 U.S.C. §8331(20). The appellant has the burden of proving by a preponderance of the evidence[1] that he is entitled to the LEO service credit he seeks. *Taylor v. Office of personnel Management,* 59 M.S.P.R. 518, 520 (1993). To determine whether the appellant has established entitlement to LEO credit,

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[1] A preponderance of the evidnce is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely true than untrue. 5 C.F.R. § 1201.56(c) (2) (1995).

the Board considers all relevant evidence, including the appellant's position description, testimony, and unsworn statements describing the actual primary duties of his position. *Ferrier v. Office of Personnel Management,* 66 M.S.P.R. 241, 244 (1995).

The appellant has presented evidence concerning the duties of his position

The record shows the following uncontested facts. The Facility, which is approximately 317 acres in size, is primarily used to detain about 400 aliens for deportation hearings before immigration judges, Within the Facility is a "secure area " where the aliens or "detainees" are housed. The secure area is surrounded by double fence and is monitored by cameras, motion sensors, and guards. Several dormitories are located in the secure area. Aliens entering or leaving the secured area must pass through a processing area in Building 9. It is standard operating policy that Facility employees may request volunteers from among the detainees to assist them in performing tasks outside the secured area. Those detainees who are approved for work details are paid $1 a day for their labor. *See* Hearing Tape; AF, Tab 5, Subtab at 1; Tab 32, Exhibit 3.

As a WG-11 Heavy Mobile Equipment Mechanic, the appellant's duties consisted of the maintenance, repair, modification, and overhaul of government owned vehicles at the Facility, primarily large diesel powered buses, but also any type of gasoline or diesel powered vehicles, engines, and heavy equipment. He was responsible for determining the maintenance and repair needs of buses from other INS offices. He was also required to instruct and advise other sector mechanics on the repair and maintenance of the INS's diesel buses.[2] AF, Tab 5,

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[2] I note that the appellant's performance work plans from 1990 to 1994 required him to fulfill the following critical elements: repairs to and maintenance of diesel powered buses and other heavy equipment; interpreting technical bulletins, manuals, blueprints, and fluidics flow data; preventative maintenance; safety; interpersonal communications

Subtab 2D; Tab 32, Exhibit U. His diesel repair shop was located approximately four blocks away from the secure area. The shop contained two workbays and a pit. *See* Hearing Tape; Tab 32, Exhibit 3.

The appellant argued that he was entitled to LEO credit because the duties of his position required him to use detainee labor. According to the appellant, his supervisor told him when he was hired in 1973 that he occupied an LEO position, and that he needed the detainees to service the Facility's 176 buses. He stated that his position description at the time reflected that he used detainees to perform his duties, and that he was surprised to learn in 1994 that his position description no longer mentioned detainees. *See* AF, Tab 5, Subtab 2B at 32; Hearing Tape.

The appellant also alleged the following. When he entered on duty at the Facility in 1973, he received orientation on regulations regarding security and the care, custody, and treatment of alien detainees while they worked under his guidance and supervision. For approximately five years, the aliens who were employed in his shop were dropped off and picked up by another employee.. Beginning in 1978, however, he had to take custody of detainees himself at the process area each work day. Four times a day, when he picked up and dropped off his detainees, he walked for 200 feet inside the secured perimeter to reach the process area of Building 9. Occasionally, when he was short of detainee volunteers, he went into the dormitories with coffee and doughnuts to "bribe" aliens into joining his work detail. *See* AF, Tab 5, Subtab 2B at 32; Hearing Tape.

The appellant usually walked or drive between four and twelve aliens back to the shop, where he assigned work to them. The detainees did "whatever needed to be done" around the shop,

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and relationships. Noncritical elements include: material utilization. AF, Tab 5, Subtab 2C.

including mechanical work, tire and oil changes, and welding. They also washed the buses. He instructed them and supervised their efforts. During the day, detainees were not always in his sight, and hand access to many tools within the shop that could be used as weapons. For three or four years in the 1990s, an unarmed contract security guard would stand by and watch the aliens as they worked, but that practice was later abandoned. At lunch time, after dropping off his detainees, he had to walk through a kitchen filled with detainees to get to the employee dining room. The appellant concluded that he spent about six hours with detainees each day, and performed most of his duties in their presence. *See* AF, Tab 5, Subtab 2B at 32-33; Hearing Tape.

The appellant's assertions were supported by other Facility employees. Roel Delgado, the appellant's fifth-line supervisor testified that the appellant was responsible for "quite a fleet" of buses at one time and that he could not have maintained even two or three buses without assistance from the detainees. He testified that he saw the appellant in the processing area inside the secure portion of the camp. The appellant's first-line supervisor, Peter Neizborski, claimed that it was impossible for the appellant and other mechanics to perform the duties of their positions without detainee labor. He asserted that everyone in the maintenance branch at the Facility had to enter the dormitories to recruit detainees for work details. Co-worker Baldomero Alcala testified that the appellant used detainees practically every day, and that between four and six detainees would be employed in the shop on various mechanical tasks while other detainees washed buses outside. Hearing Tape, Side A.

In its response to the appellant's evidence, the agency made the following assertions. The appellant occasionally requested non-criminal alien work details to assist in the performance of his duties, which usually consisted of two or three aliens who performed menial labor, such as cleaning the work area and washing the agency's buses. AF, Tab 23 at 2. Only aliens who

had not been convicted of a criminal violation and were not considered dangerous were permitted to work outside the security area of the Facility compound. The agency asserted that the typical alien participating on a work detail illegally entered the United States and was detained pending the outcome of their administrative deportation or exclusion hearing. *ID.*, Tab 21.

Cecilio Ruiz, the Facility's Assistant District Director for Detention and Deportation, testified as follows. The Facility does not detain criminals. The detainees in the Facility, who have crossed the border illegally, have violated a Federal criminal law. They are not referred to the United States Attorney's Office and are not prosecuted. Their hearings before immigration judges are civil, not criminal, matters. Approximately 12% of the detainee population at the Facility "at one time or another" committed a crime. Detainees with a criminal record, history of violence, or reputation for trouble are clothed in distinguishing red jumpsuits, and are not allowed outside the secured area. They will be barred from participating in work details by guards within the processing area who have detainee records at hand. The appellant is not authorized or expected to investigate, subdue, or detain any aliens. Nor is he required to use alien details to perform his job. Hearing Tape.

Jesse Rosales, the Chief Detention Enforcement Officer at the Facility, testified that an unarmed contract security officer was expected to supervise the washing of INS buses by detainees. He states that the appellant was expected to telephone if any of his detainees escaped, and that he may be called upon to assist as a lookout during an escape. Hearing Tape.

The appellant has not proven that he was a law enforcement officer.

Upon reviewing the facts of this case, I find that the appellant has not established that the primary duties of this position were to detain individuals suspected or convicted of offenses against the

criminal laws of the United States. 5 U.S.C. § 8331(20). I note that the appellant's position description and his work performance plans made no reference whatsoever to detainees. AF, Tab 5, Subtab 2D; Tab 32, Exhibit U. Further, while his duties included frequent direct contact with individuals who likely were suspected or convicted of criminal offenses under United States law, *See* 8 U.S.C. §§ 1325-26, the appellant did not explain how those interactions constituted the basis reason for the existence of his position. *See Ferrier,* 66 M.S.P.R. at 244. He did not show that the bulk of his time was spent detaining, directing, supervising, inspecting, training, employing, caring for, transporting, or rehabilitating his detainee work crews. *See* 5 U.S.C. § 8331(1)(20); 5 C.F.R. § 831.902 (1995); *Obremski v. Office of Personnel Management,* 699 F.2d 1263, 1271 (D.C. Cir. 1995).

Accordingly, while I find that the appellant could not have performed a variety of expected tasks without detainee labor, I conclude that his use of alien details was an incidental duty in his position. *See* 5 C.F.R. § 831.902 (1995); *Ferrier,* 66 M.S.P.R. at 244. Therefore, I conclude that the appellant has not shown that it is more likely true than not true that he is entitled to retirement credit as a law enforcement officer.

DECISION

The agency's determination is AFFIRMED.

FOR THE BOARD

Michael T. Dougherty
Administrative Judge

UNITED STATES GOVERNMENT
MEMORANDUM

P

SW 71/17-

DATE: April 5, 1967

TO : District Director
Port Isabel, Texas

FROM : E. W. Myers, Assistant Regional Commissioner
Administrative Services, Southwest Region

SUBJECT: Retirement Eligibility under Section 8336(c), Title 5, United States Code for Chief Cooks, Cooks, and General Mechanics at Detention Facilities

Attached for your information is a copy of a letter recently received from the Civil Service Commission in response to our request for formal confirmation of the eligibility of Chief Cooks, Cooks, and General Mechanics under Section 8336(c), of Title 5, United States Code. The Commission indicates that although all of these position appear to fall within the purview of Section 8336(c), they would prefer to have each case decided on its individual merits. Accordingly, please insure that any application for 8336(c) retirement which base eligibility on employment in these position contain the required evidence outlined in the last paragraph of the Civil Service Commission's letter.

Please advise appropriate employees of the above.

Attachment

UNITED STATES CIVIL SERVICE COMMISSION
BUREAU OF RETIREMENT AND INSURANCE
WASHINGTON, DC 20415

IN REPLY PLEASE REFER TO
RL;MAC;cjs

MAR 14, 1957

Mr. Ernest C. Friesen, Jr.
Assistant Attorney General
for Administration
United States Department of Justice

Dear Mr. Friesen:

This is in reply to your letter of January 12 presenting for consideration under section 6(c) of the Civil Service Retirement Act, now section 8336(c) of title 5, United States Code, the position of Chief Cook, Cook, and General Mechanic at Alien Detention Centers of the Immigration and Naturalization Service.

As stated in the law, an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position, who is separated from the service after becoming 50 years of age and completing 20 years of service in the performance of these duties is entitled to an annuity if the head of his agency recommends his retirement and the Civil Service Commission approves that recommendation.

By Minute 1 of May 20, 1958, the Commission recorded its decision that the Word "detention" appearing in the law is not limited to employees of agencies specifically listed therein but is construed to include employees of any agency whose duties are as

described in that sentence. Accordingly, this provision covers any employee whose duties in connection with the detention of persons suspected or convicted of Federal criminal offenses require his frequent direct contact with such persons in their detention, direction, supervision, inspection, training, employment, caring for, transportation, or rehabilitation.

From facts developed in a discussion with members of your staff the Immigration and Naturalization Service and in the exhibits submitted, we would hold that employees of the detention facilities here involved as have the cited frequent contact with persons in detention would fall in the category described above. However, rather than viewing these positions as generally coming under section 8336(c), title 5, U.S.C., we believe the purpose of the law would be equally served if each case were decided on its individual merits rather than on the title or general description of the class of positions involved.

As outlined in the Federal Personnel Manual Supplement 831-1 (subchapter S9-2), the annuity application in these cases must not only be accompanied by an official statement that the employee's retirement is recommended by the head of the agency but the statement must also outline the degree of hazard to which the individual was subjected in the performance of his duties; that is, it must recite (1) where the employee actually works, i.e., where his basic position is located, (2) the frequency of prisoner contacts (daily, weekly, etc.), (3) the average length of each contact, (4) the type of contact (training, care, rehabilitation, etc.), and any other pertinent available information bearing on the matter.

Sincerely yours,

Andrew E. Ruddock
Director

S9-3. SPECIAL ELIGIBILITY FOR LAW ENFORCEMENT OFFICERS AND FIREFIGHTERS

a. **Requirements.** An employee under the retirement system is eligible for voluntary retirement on an immediate annuity under the special provision for law enforcement officers and firefighters upon meeting the following conditions:

(1) Employment under the retirement system for at least one year within the 2-year period immediately preceding the separation on which annuity is based.

(2) Age 50 or over.

(3) At least 20 years of creditable service as a law enforcement officer or firefighter, or any combination of such service totaling at least 20 years, as described below.

b. **Purpose of special provision.** The legislative history of this provision, which initially affected only law enforcement officers of the Federal Bureau of Investigation, shows that its purpose was to allow the earlier retirement of those law enforcement officers whose duties are primarily the investigation, apprehension, or detention of persons suspected or convicted of offenses against the criminal laws of the United States and who, because of the physical requirements of their position are no longer capable of carrying on efficiently, and their replacement by younger employees would improve the service. Since August 14, 19972, this reasoning has been applied equally to Federal firefighters. A more generous method of computing the amount of annuity I provided, not as a special reward for the type of service involved, but rather because a more liberal formula is usually necessary to make the earlier retirement (with resultant shorter service) economically possible.

c. **determination of coverage and OPM review.**

(1) This special provision covers any employee, whose primary duties, as set forth in the official position description (see 5 C.F.R. 831.903(a)), require the investigation, apprehension, or detention of persons suspected or convicted of offenses against the criminal laws of the United States including such an employee who is transferred to a supervisory or administrative position in this type of activity. **When the employee's coverage is dependent upon being required to have frequent direct contact with persons in detention, the fact of the contact must be clearly established.**

(a) where the employee actually works;

(b) the frequency of prisoner contacts;

(c) the average duration of these contacts;

(d) the type of contact (training, care, rehabilitation, etc.) and any other pertinent available information bearing on the matter.

(2) This special provision also covers employees whose primary duties, as set forth in the official position description (see 5 C.F.R. 831.904(a)), require the performance of work directly connected with the control and extinguishing of fires, or the maintenance and use of firefighting apparatus and equipment, including such employee who is transferred to supervisory or administrative position in this type of activity.

(3) The determination of whether an employee is in a covered law enforcement officer or firefighter position is made by the appropriate administrative authority of an agency (the agency head or officials of major divisions of the agency to whom the agency head delegates the authority), with the concurrence of OPM.

(4) For purposes of this concurrence, a position description (together with any other documentary evidence) must be submitted by the appropriate administrative authority to the Office of Personnel Management, Compensation Group to

support a determination that the primary duties of the position are such as to make the definition of law enforcement officer or firefighter applicable. Similarly, evidence must be submitted to support a determination that the requirements pertaining to supervisory and administrative positions have been met (see section S9-3, paragraph e).

d. **Retirement Application and Death Claim Procedures.**
(1) Personnel officials should be very careful in ascertaining that retirement applications have at least 20 years of service that has previously been approved by OPM as being law enforcement officer or firefighter service. If service in a particular position has not been so approved, or doubt exists whether all or a portion of the minimum required 20 years of service.

UNITED STATES GOVERNMENT SER-P-155
MEMORANDUM

SE 71/83-

P

Date: December 18, 1974

TO : All District Directors, Officers in Charge
and Chief Patrol Agents, Southeast Region

FROM : Regional Commissioner
Richmond, Virginia

SUBJECT: Law Enforcement Retirement

Effective January 5, 1975, the employee retirement deduction and the agency contribution for law enforcement personnel will be increased to 7 1/2 percent of both regular and premium pay.

The attached memorandum from Central Office relating to law enforcement retirement should be furnished to all supervisors and managers for calling to the attention of all law enforcement personnel.

We are attempting to identify all employees in this Region who will be affected by the increase in retirement deductions. All employees serving in the following journeyman positions will automatically have the 7 1/2 percent withheld for retirement:

Border Patrol Agent
Criminal Investigator
Detention Guard
Deportation Officer
Airplane Pilot (Border Patrol)

Employees serving in certain supervisory or administrative positions may be eligible to have the 7 1/2 percent withheld for retirement if they transferred from a law enforcement position without a break in service. All supervisory and administrative personnel who may be eligible have been contacted by this office.

Attachment

Distribution A(1)

UNITED STATES GOVERNMENT
MEMORANDUM

P CO 918.4 -

1974 Date: 6 DEC

TO : All Supervisors and Managers, Service-wide

FROM : Commissioner

SUBJECT: Law Enforcement Retirement

In Open Line of July 23, we reported the significant changes in the Civil Service Retirement law covering law enforcement personnel. One of the amendments provides that a law enforcement employee's retirement deduction and the matching agency contribution will be increased to 7 1/2 percent of both regular and premium pay, effective January 5, 1975.

As required by the Civil Service Commission, we identified those position, the duties of which are subject to the provisions of the law enforcement retirement law. They are as follows:

(1) Positions clearly approved by the CSC, because the duties are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States (hereinafter referred as journeyman position).

Border Patrol Agent
Criminal Investigator
Detention Guard
Deportation Officer
Airplane Pilot (Border Patrol)

Also, supervisory or administrative positions in these activities, (e.g., Supervisory Border Patrol Agent, Supervisory Criminal Investigator, Border Patrol Agent in the Regional or Central Office, provided that service in the supervisory or administrative position immediately follows service as a "law enforcement officer" within the meaning of the retirement law -- Journeyman, supervisory or administrative.

(2) Positions which currently require prior approval by the CSC on an individual basis (accompanied by the supporting statements and /or evidence).

Assistant Officer-in-Charge
Assistant Regional Commissioner, Administrative Services
Assistant Regional Commissioner, Security
Associate Deputy Regional Commissioner, Management
Associate Deputy Regional Commissioner, Operations
Deportation Liaison Officer
Deputy Commissioner
Deputy District Director
Deputy Regional Commissioner
District Director
Executive Assistant to the Commissioner
Executive Assistant to the Duty Commissioner
Intelligence Officer
Liaison Officer, Ottawa, Ontario Canada
Management Analysis Officer (Director of Field Inspections)
Management Analyst (Field Inspector)
Officer-in-Charge
Regional Commissioner
Regional Deportation Officer
Regional Intelligence Officer
Supervisory Intelligence Officer

Officer -in-Charge (Foreign Offices)
District Director (Foreign Offices)
Assistant Regional Deportation Officer
Immigration Officer (Foreign Offices)
Immigration Officer (Toledo, Ohio)
Supervisory Immigration Officer,Christiansted, St Croix, V.I.
Supervisor, Detention Facility, El Centro, El Paso, Port Isabel
Cook, Detention Facility, El Centro, El Paso, Port Isabel
Chief Cook, Detention Facility, El Centro, El Paso, Port Isabel
General Mechanic, Port Maintenance Section, El Centro and El Paso
General Maintenance Worker, Port Maintenance Section, El Centro and El Paso
Medical Technical Assistant, Detention Facility, El Paso

The majority of the position listed under (2), above fall within the category of secondary position (supervisory or administrative), and are considered qualifying provided that service in the secondary position immediately follows service in a journeyman, supervisory or administrative reflect that he incumbents are supervising persons relating to such activities. It should be noted, however, that in a case where an individual has served in several supervisory or administrative positions during his Service career, he must have entered the initial supervisory or administrative position from a journeyman position in order to maintain his coverage under the law.

Other position under (2), above, such as Cook and General Mechanic, have been approved by the CSC in the past, because their duties in connection with individuals in detention require frequent, direct contact with these individuals. The Immigration Officers listed are covered at the journeyman level.

Service Personnel Offices are now in the process of identifying those employees currently serving in "law enforcement officer" positions. who will be effected by the increased retirement deduction, effective January 5. If you have an employee serving in a position, the duties of which he believes are covered under the current criteria for law enforcement retirement, and that position has not been listed above, he should submit his case, in writing, immediately to his Personnel Office, for further consideration of his coverage under the law. We do not want to overlook any employee who may be eligible for law enforcement retirement, since in order to be eligible, the record must reflect that the required deductions have been made. Conversely, if deduction have been made and it is determined that an individual does not meet the eligibility requirements, his additional one-half percent contributions will be refunded, without interest.

For the Commissioner

Associate Commissioner, Management